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In The
Supreme Court of the United States

October Term, 1982

THE STATE OF ARIZONA, ET AL.,
Petitioners,

versus

SAN CARLOS APACHE TRIBE OF ARIZONA
AND THE NAVAJO TRIBE OF INDIANS, ET AL.,

THE STATE OF MONTANA, ET AL.,
Petitioners,

versus

NORTHERN CHEYENNE TRIBE OF THE NORTHERN
CHEYENNE INDIAN RESERVATION, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS IN No. 81-2147

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QUESTIONS PRESENTED FOR REVIEW

I. DO THE DISCLAIMERS IN ARIZONA'S ENABLING ACT AND CONSTITUTION DEPRIVE ITS COURTS OF JURISDICTION TO ADJUDICATE WATER RIGHTS CLAIMED BY THE UNITED STATES FOR INDIAN TRIBES, NOTWITHSTANDING THE McCARRAN AMENDMENT AND THIS COURT'S HOLDING IN *COLORADO RIVER WATER CONSERVATION DISTRICT V. UNITED STATES*?

II. DID THE ARIZONA DISTRICT COURT CORRECTLY DETERMINE THAT CONSIDERATIONS OF WISE JUDICIAL ADMINISTRATION REQUIRE ADJUDICATION OF ALL CONFLICTING WATER RIGHTS IN A COMPREHENSIVE STATE GENERAL ADJUDICATION, RATHER THAN THROUGH PIECEMEAL FEDERAL AND STATE ACTIONS?

PARTIES BEFORE THE COURT OF APPEALS

I. SAN CARLOS APACHE TRIBE OF ARIZONA, Plaintiff-Appellant, v. THE STATE OF ARIZONA, a body politic; and the State Land Department of the State of Arizona; and John M. Little, Individually and as Acting Commissioner of the State Land Department of the State of Arizona; and Salt River Valley Water Users' Association, an Arizona Corporation, Defendants-Appelles.

PAYSON COMMUNITY OF YAVAPAI-APACHE INDIANS, Plaintiff-Appellant, v. THE STATE OF ARIZONA, a body politic; and the State Land Department of the State of Arizona; and John M. Little, Individually and as Acting Commissioner of the State Land Department of the State of Arizona; and Salt River Valley Water Users' Association, an Arizona corporation, Defendants-Appellees.

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, Plaintiff-Appellant, v. THE STATE OF ARIZONA and John M. Little, Acting Commissioner of the Arizona State Land Department, Defendants-Appellees.

FORT McDOWELL MOHAVE-APACHE INDIAN COMMUNITY, for and on behalf of itself and its members, Plaintiff-Appellant v. SALT RIVER VALLEY WATER USERS' ASSOCIATION; Salt River Project Agricultural Improvement and Power District; City of Phoenix; City of Prescott; City of Jerome; Phelps Dodge Corporation; Phelps Dodge Industries, Inc.; Arizona Water Company; Miller Brothers Farms, Inc.; Camp Verde Water Systems; Cottonwood Water Works, Inc.; Copper Basin Water

Co.; V Bar V Cattle Co., Inc.; Harold W. Bullard; and the State of Arizona, Individually and as representative of a class composed of all others similarly situated, Defendants-Appellees.

II. NAVAJO NATION, aka The Navajo Tribe of Indians, Plaintiff-Appellant, v. UNITED STATES of AMERICA; State of Arizona, Defendants-Appellees.[1]

[1] Pursuant to Rule 19.4 of the Rules of the Supreme Court of the United States the petitioners in No. 81-2147 sought review of these two companion cases decided by the United States Court of Appeals for the Ninth Circuit one day apart which involve identical questions.

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BRIEF FOR THE PETITIONERS IN NO. 81-2147

OPINIONS BELOW

The opinion of the Court of Appeals in *San Carlos Apache Tribe v. Arizona* is reported at 668 F.2d 1093 and the opinion in *Navajo Nation v. United States* is reported at 668 F.2d 1100. (Pet. App. A and B). The order of the district court in *Navajo Nation v. United States* was not reported. (Pet. App. D). The opinion of the district court relating to all of the other Arizona cases is reported at 484 F.Supp. 778 (D. Ariz. 1980). (Pet. App. E).

JURISDICTION

The judgment of the Court of Appeals in *San Carlos Apache Tribe v. Arizona* was entered on February 23, 1982, and was entered in *Navajo Nation v. United States* on February 24, 1982. The petition for a writ of certiorari in No. 81-2147 was filed on May 12, 1982 and was granted on October 4, 1982.[2] The Order granting the petition in No. 81-2147 also ordered that case consolidated with *State of Montana, et al. v. Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, et al.*, No. 81-2188.[3] This Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 20 of the Federal Enabling Act of June 20, 1910, 36 Stat. 557, 569, provides in pertinent part:

> And said convention shall provide, by an ordinance irrevocable without the consent of the United States and the people of said State—
>
> Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title

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[2] The list of corporate subsidiaries and affiliates of petitioners Phelps Dodge Corporation and Phelps Dodge Industries, Inc. required by Rule 28.1, Rules of the Supreme Court of the United States, was set forth in the petition for a writ of certiorari in No. 81-2147 at page i.

[3] Since the opinions in the two Arizona cases relied heavily upon the reasoning and analysis in *Northern Cheyenne Tribe v. Adsit*, 668 F.2d 1080 (9th Cir. February 22, 1982), a copy of that opinion was included as Appendix C to the petition in No. 81-2147.

of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States;. . . .

2. Article XX, Section 4 of the Arizona Constitution provides in pertinent part:

Fourth. The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

3. United States Code, Title 43, provides:

Section 666. Suit for adjudication of water rights—Joinder of United States as defendant; costs

(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subjected to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the

same manner and to the same extent as a private individual under like circumstances; *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

4. United States Code, Title 25, provides:

Section 1322. Assumption by State of civil jurisdiction—Consent of United States; force and effect of civil laws.

(a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal

treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

5. United States Code, Title 25, provides:

Section 1324. Amendment of State constitutions or statutes to remove legal impediment; effective date

Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

STATEMENT OF THE CASE

In the arid west almost all surface water is captured and used. As a result, it is necessary to determine with certainty the rights to use the water. Arizona, like Colorado, New Mexico and most other western states, therefore, has statutory procedures for adjudicating relative water rights in a general adjudication, in which all potential claimants are joined and in which each claimant's water right is determined vis-a-vis the right of every other claimant. (JA 119-128).

Historically, the process of comprehensive river system adjudication was often frustrated in the western states by the impossibility of joining the United States as an involuntary defendant in those proceedings where the United States claimed water rights, either on its own behalf or as trustee for its Indian wards. In 1952, Congress recognized the importance of compelling the United States' presence in these actions through its enactment of the McCarran

Amendment, 43 U.S.C. § 666, 66 Stat. 560, which permitted the United States' involuntary joinder in comprehensive river system adjudications.[4]

Application of the McCarran Amendment's special waiver of the United States' sovereign immunity is particularly important in Arizona where the United States controls extensive land holdings. Indeed, Arizona's Salt and Verde rivers, which provide all of the surface water for the State's rapidly expanding municipal and industrial populations in the cities of Phoenix, Tempe, Mesa, Scottsdale, Chandler, Glendale, Peoria, Sun City and Tolleson, as well as much of the Salt River Valley's irrigation water, are bordered upstream by extensive federal lands, including four Indian reservations. Additional federal lands and reservations are scattered across the 13,000 square mile watershed which feeds these critical river systems. (JA 91-98).

On April 26, 1974, the Salt River Valley Water Users' Association invoked Arizona's statutory general adjudication procedure[5] by filing a petition with the Arizona State Land Department to determine the conflicting rights to the use of water of the Salt River and its tributaries above Granite Reef Dam, excepting the Verde River and its tributaries. (JA 26). It filed a similar petition on February 25, 1976, for the Verde River and its tributaries. (JA 342).

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[4] *See*, Senate Report No. 755, 82d Cong., 1st Sess., pt. 1 (1951) (Pet. App. F).

[5] A.R.S. § 45-231 *et seq.*, repealed by Laws 1979, Ch. 139, § 38. In 1979, the Arizona legislature refined the statutory general adjudication procedure which had been in effect in Arizona for over fifty years. These revisions are codified at A.R.S. § 45-251 *et seq.* (Supp. 1982). In accordance with these amendments, the Salt, Verde, Gila and Little Colorado general adjudications were transferred from the State Land Department to the Arizona Superior Court, where they are presently pending. See Pet. App. G and H.

On February 17, 1978, Phelps Dodge Corporation filed two petitions—one to determine conflicting rights to the use of water of the Gila River,[6] (JA 350), and the other to determine conflicting rights to the use of water of the Little Colorado River.[7] (JA 262).

In January and February of 1979, process was served by certified mail on approximately 12,000 known potential water claimants in the Salt River general adjudication, including the United States.[8] In July, 1981, process was similarly served on some 58,000 known potential water claimants, including the United States, in the Little Colorado River general adjudication. The United States was joined, pursuant to the McCarran Amendment, 43 U.S.C. § 666(b), in both of these general adjudications to adjudicate not only its own rights, but also those rights it holds on behalf of its Indian wards.[9] Service of process on unidentified potential water claimants was also effected by publication in numerous newspapers of general circulation throughout the affected areas. On November 25, 1981 the Arizona Supreme Court consolidated the adjudications of the Salt and Verde rivers into the Gila River system adjudication.

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[6] The Salt and Verde rivers are the major tributaries to the Gila River, the drainage area of which covers more than half the area of the State of Arizona.

[7] The drainage area of the Little Colorado River covers another 19% of the State of Arizona, as well as 5,297 square miles within the State of New Mexico. The Navajo Indian reservation is situated on the Little Colorado watershed in both Arizona and New Mexico; the Hopi Indian reservation is located entirely on Arizona's share of that watershed. (JA 242).

[8] Service of process upon known potential claimants to the Verde River has not yet occurred; however, it is anticipated that approximately 80,000 persons will be served by certified mail as potential claimants.

[9] Rights held by the United States on behalf of Indians would include those held on behalf of all of the respondent tribes, *i.e.*, the San Carlos Apache Tribe of Arizona, White Mountain Apache Tribe, Payson Community of Yavapai-Apache Indians, Salt River Pima-Maricopa Indian Community, Fort McDowell Mohave-Apache Indian Community and the Navajo Tribe of Indians.

After service of process in the Salt River general adjudication, the six Indian tribes on that watershed which received formal notification of the pendency of the state adjudication filed actions in the Arizona district court to stop the general adjudication in state court. The White Mountain Apache Tribe, the Gila River Indian Community and the Salt River Pima-Maricopa Indian Community filed removal petitions.[10] Other tribes filed complaints in the district court seeking declarations that the Arizona state courts lacked jurisdiction to adjudicate Indian water rights due to Arizona's Enabling Act and constitutional disclaimers over Indian lands.[11] These tribes also requested the district court to enjoin any further proceedings in the state courts affecting their claimed water rights.[12] Two other tribes took a different approach. The Fort McDowell Mohave-Apache Indian Community sought a declaration only of *its* water rights to the Verde River in a "defendant class action."[13] This approach was also followed by the San Carlos Apache Tribe with respect to its claim to the Salt

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[10] *White Mountain Apache Tribe Petition for Removal*, No. CIV 79-182 PHX VAC (D. Ariz. petition filed March 7, 1979); *Gila River Indian Community Petition for Removal*, No. CIV 79-183 PHX VAC (D. Ariz. petition filed March 7, 1979); *Salt River Pima-Maricopa Indian Community Petition for Removal*, No. CIV 79-184 PHX VAC (D. Ariz. petition filed March 7, 1979).

[11] *See* Act of June 20, 1910, 36 Stat. 557, 569; Ariz. Const. Art. XX, § 4. The texts of these disclaimers are set forth at 2-3, *supra*.

[12] *Salt River Pima-Maricopa Indian Community v. State of Arizona*, No. CIV 79-185 PHX VAC (D. Ariz. complaint filed March 7, 1979) (JA 159); *San Carlos Apache Tribe of Arizona v. State of Arizona*, No. CIV 79-186 PHX VAC (D. Ariz. complaint filed March 7, 1979) (JA 5); *Payson Community of Yavapai-Apache Indians v. State of Arizona*, No. CIV 79-187 PCT VAC (D. Ariz. complaint filed March 7, 1979) (JA 133). The San Carlos Apache Tribe and the Payson Community of Yavapai-Apache Indians also sought removal of the state general adjudication in the alternative.

[13] *Fort McDowell Mohave-Apache Indian Community v. Salt River Valley Water Users' Association*, No. CIV 79-267 PHX VAC (D. Ariz. complaint filed April 13, 1979) (JA 330).

River.[14] Finally, the Navajo Tribe filed a complaint in federal court seeking a general adjudication of all conflicting water rights in the watershed of the Little Colorado River,[15] but it promptly filed an amended complaint, (JA 234), to convert its action into another "defendant class action" to determine only its rights after the State of Arizona moved to dismiss the original complaint. None of these federal court actions sought a comprehensive river system adjudication of all relative water rights.

The district court's jurisdiction over the tribes' removal actions was asserted pursuant to 28 U.S.C. § 1441. Jurisdiction over the other tribal actions was asserted pursuant to 28 U.S.C. §§ 1331, 1332, 1362, 2201, 2202 or combinations thereof.

Motions to remand and motions to dismiss these actions, grounded principally on this Court's decision in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), were promptly filed by the petitioners. After this Court denied a writ of certiorari to the Tenth Circuit Court of Appeals in *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (10th Cir. 1979), *cert. denied*, 444 U.S. 995 (1979), United States District Court Judge Valdemar A. Cordova, in reliance upon *Colorado River* and *Jicarilla*, held that the proceedings in the Arizona state courts were general adjudications in which all federal water rights, including those held on behalf of Indians, could properly be determined pursuant to the McCarran Amendment. (Pet. App. E-13; 484 F. Supp. at 784). Specifically, Judge Cordova adopted the reasoning of the Tenth Circuit in *Jicarilla*: "To hold now that the Arizona disclaimer clauses and similar clauses contained in the enabling acts of six other Western states bar general water rights adjudications in the State court would defeat the [McCarran]

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[14] *San Carlos Apache Tribe v. State of Arizona*, No. CIV 79-269 PHX CAM (D. Ariz. complaint filed April 16, 1979).

[15] *Navajo Nation v. United States*, No. 79-276 PCT VAC (D. Ariz. complaint filed April 17, 1979) (JA 220).

Amendment's objective." (Pet. App. E-10; 484 F. Supp. at 783). He also held that "[t]hose rights which are State created will be determined by State law and Federal law will be applied to determine those rights which derive from Federal law." (Pet. App. E-13; 484 F.Supp. at 784). Accordingly, the petitioners' motions to remand and to dismiss the tribes' federal actions were granted. In the Navajo Tribe's lawsuit, Judge Cordova denied the motion to dismiss, but stayed the federal proceedings pending determination of the Navajo Tribe's water rights in the state court general adjudication on the Little Colorado River. (Pet. App. D-1).

The remand of the removal cases was not appealed. The other five Arizona cases were appealed by the tribes to the Court of Appeals for the Ninth Circuit. These appeals were consolidated for oral argument before Presiding Judge Merrill and Judges Choy and Ferguson on July 15, 1981. The Ninth Circuit also scheduled twelve consolidated appeals from the Montana district court, involving similar issues, for hearing later that day, although the Montana appeals were never formally consolidated with the Arizona cases.

Reversing the Arizona district court, the Ninth Circuit rendered its split decisions on February 23 and 24, 1982, in *San Carlos Apache Tribe v. State of Arizona* and *Navajo Nation v. United States*. The two judge majority relied on its February 22, 1982 decision on the twelve Montana appeals in *Northern Cheyenne Tribe v. Adsit* in holding that, notwithstanding the McCarran Amendment, the Arizona state courts still lack jurisdiction to determine water rights held by the United States on behalf of its Indian wards.

Rejecting the Tenth Circuit's decision in *Jicarilla*, upon which the Arizona district court had partially relied, the Ninth Circuit carved out a very large exception to the McCarran Amendment's grant of state court jurisdiction by holding that Arizona's disclaimer provisions preclude its state courts from adjudicating Indian water rights. The Court of Appeals held that the state courts could properly assert such jurisdiction only if Arizona had complied with

the procedures set forth in Public Law 83-280[16] , even though it conceded that Public Law 280 "does not purport to limit the special consent to jurisdiction given by the McCarran Amendment." (Pet. App. C-5; 668 F.2d at 1084). Accordingly, the two judge majority remanded the actions to the district court for the sole determination of whether Arizona has assumed jurisdiction under Public Law 280. (Pet. App. A-11; 668 F.2d at 1098). Judge Merrill dissented in all three decisions, and further observed in the Arizona appeals:

> In my judgment wise judicial administration would not tolerate the confusion which these suits would create and the havoc they can be expected to play with the state's statutory efforts to deal with its problems of water scarcity—problems faced not just by Indians, but by every resident of the state; problems of such awesome dimensions that the state's efforts to solve them should have federal respect and encouragement. (Pet. App. A-13; 668 F.2d at 1099).

As a result of the Ninth Circuit's decision in *San Carlos Apache Tribe v. State of Arizona*, the Arizona state court on March 24, 1982, stayed all further proceedings in the consolidated Gila River system adjudication until further review by this Court. (Pet. App. G). Likewise, as a result of the Ninth Circuit's decision in *Navajo Nation v. United States*, the Arizona state court stayed all further proceedings in the Little Colorado adjudication, including the May 1, 1982 deadline for filing statements of claimant, until further resolution of the issues by this Court. (Pet. App. H).

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[16] Act of August 15, 1953, 67 Stat. 588, as amended by Title IV of the Indian Civil Rights Act, the Act of April 11, 1968, 82 Stat. 79.

SUMMARY OF ARGUMENT

I

This Court was careful not to "enervate the [McCarran] Amendment's objective," in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 811 (1976), by excluding Indian water rights from its coverage. Yet, that is precisely the effect of the decisions of the Court of Appeals as to Arizona and at least eight other western states. Because of the provision in Arizona's constitution acknowledging that Congress retained "absolute jurisdiction and control" over Indian lands, the Ninth Circuit held that McCarran's grant of jurisdiction does not permit Arizona to adjudicate claims to water asserted by the United States on behalf of Indians.

The McCarran Amendment's legislative history, however, establishes that a common understanding existed among the Congress, the Executive Branch and the public that it would be operative throughout the 17 western states. Congress intended no distinction, and made no distinction, between those nine western states with disclaimers and those without.

This intention is also consistent with numerous other Acts of Congress, adopted prior to and subsequent to McCarran, which were clearly intended by Congress to be universally applicable wherever Indian lands were located, notwithstanding the disclaimers. This legislation ranges in subject matter from permitting state authorities to establish public highways, in accordance with state law, across Indian lands, 25 U.S.C. § 311, to authorizing all states to enforce sanitation and quarantine laws on Indian reservations. 25 U.S.C. § 231. Not one of these Acts required repeal of the disclaimers as a condition to its effectiveness.

Moreover, the wording of Arizona's disclaimer is not in conflict with exercise of Arizona court jurisdiction over the United States under McCarran. First, the disclaimer's acknowledgment of paramount congressional control is wholly consistent with Congress' passage of McCarran. That Act is

a good example of that "absolute jurisdiction and control" over Indian lands. Second, even in the disclaimer states this Court has recognized with consistent clarity since its holding in *Williams v. Lee*, 358 U.S. 217, 220 (1959), that "absent governing Acts of Congress" state infringement of tribal self-government or state intrusion upon an area preempted by federal regulation are the tests. Again, McCarran, as that governing Act of Congress, permits, not precludes, the Arizona state courts' assertion of jurisdiction over the United States and its Indian water claims. And, even the Court of Appeals acknowledged that the Arizona state court comprehensive adjudications do not interfere with tribal self-government.

Section II discusses the district court's proper dismissal of the Arizona tribes' federal actions under *Colorado River's* "considerations of wise judicial administration." In *Colorado River*, as in the pending Montana cases, there was a choice between proceeding in the state or federal forum since comprehensive general adjudications were pending for the same river systems in both courts. Nevertheless, this Court sanctioned dismissal of the federal adjudications in *Colorado River* primarily because "the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as a means for achieving these goals." 424 U.S. at 819.

The policy favoring dismissal of the Arizona federal actions is even more compelling than in *Colorado River* or in the pending Montana cases. Not one of the tribes' federal actions in Arizona seeks the general adjudication of any water rights; *the only general adjudications are those pending in the Arizona state courts.* Continuation of the Arizona federal actions can only result in the piecemeal

adjudication of only a few of the several tribal claims to the Gila and Little Colorado River systems and the corresponding frustration of the State's efforts to adjudicate comprehensively its major river systems.

Affirmance of the Court of Appeals' decisions stopping Arizona from adjudicating claims asserted by the United States on behalf of Indians in its comprehensive state proceedings would spell defeat for McCarran's fundamental policy of avoiding piecemeal adjudication of water rights. The Ninth Circuit effectively repealed the McCarran Amendment by judicial *fiat* in the nine western states containing the 21 largest Indian reservations and nearly half of the Nation's Indian population. This result must be reversed and the Arizona district court's decisions reinstated.

ARGUMENT

I

THE DISCLAIMERS IN ARIZONA'S ENABLING ACT AND CONSTITUTION DO NOT DEPRIVE ITS COURTS OF JURISDICTION UNDER THE McCARRAN AMENDMENT TO ADJUDICATE WATER RIGHTS CLAIMED BY THE UNITED STATES FOR INDIAN TRIBES.

A. *The McCarran Amendment Does Not Create A Jurisdictional Distinction Between Disclaimer And Non-Disclaimer States.*

The McCarran Amendment was enacted in 1952 to waive the sovereign immunity of the United States to suit in comprehensive state and federal water adjudication proceedings so as to permit the meaningful determination of

all conflicting water rights on a river system.[16] In *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), this Court acknowledged that "[t]he clear federal policy evinced by [McCarran] is the avoidance of piecemeal adjudication of water rights in a river system," 424 U.S. 819, and held that "[t]he consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals." *Id.* Recognizing that "[i]t was unmistakably the understanding of proponents and opponents of the legislation that it comprehended water rights reserved for Indians,"[17] *id.* at 811, this Court held:

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[16] Congress was particularly concerned about the inability to adjudicate water rights in a meaningful manner whenever the United States or any other water claimant claimed immunity from joinder in the adjudication proceedings:

> It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts .... The bill (S. 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity.

S.Rep. No. 755, 82d Cong., 1st Sess., pt. 1, at 5 (1951) (Pet. App. F) (hereinafter "Senate Report").

[17] After an extensive review of McCarran's legislative history, this Court explained in *Colorado River* that "participants for the Department of Justice and the Department of the Interior made clear that the proposal would include water rights reserved on behalf on Indians," *id.* at 811-12, citing Hearings on S. 18 Before a Subcommittee of the Committee on the Judiciary, United States Senate, 82nd Cong., 1st Sess. (1951) (hereinafter "Senate Hearings") at 6-7, 67-68, and that "the Senate Report on the amendment took note of a recommendation in a Department of the Interior report that no consent to suit be given as to Indian rights and rejected the recommendation." *Id.*, citing the Senate Report at 2, 7-8.

> Thus, bearing in mind the ubiquitous nature of Indian water rights in the Southwest, it is clear that a construction of the [McCarran] Amendment excluding those rights from its coverage would enervate the Amendment's objective.

Id.

Attempting to distinguish *Colorado River*, the Ninth Circuit here carved out a debilitating exception to McCarran's grant of state court jurisdiction by holding that this grant did not extend to the State of Arizona because Arizona, as conditions to its admission to the Union, had agreed to "forever disclaim all right and title ... to all lands ... owned or held by any Indian or Indian tribes" and acknowledged that such lands shall "remain subject to the disposition and under the absolute jurisdiction and control of the Congress ...." (Pet. App. A-7-A-8; 668 F.2d at 1097). The Enabling Act's wording is mirrored in the Arizona Constitution. Ariz. Const. Art. XX, § 4.[18] The Ninth Circuit held that until this constitutional disclaimer is expressly repealed, state court jurisdiction to adjudicate federal claims for Indian water rights is barred in Arizona, notwithstanding the McCarran Amendment. (Pet. App. A-8-9; 668 F.2d 1097). Thus, contrary to this Court's admoni-

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[18] The New Mexico and Arizona Enabling Acts were both contained in the Act of June 20, 1910, 36 Stat. 557. The first eighteen sections apply to New Mexico; the remaining sections apply to Arizona. New Mexico's admission was subjected to identical conditions, which were also included in the New Mexico Constitution. N.M. Const. Art. XXI, § 2.

Idaho, Montana, North Dakota, South Dakota, Utah, Washington, and Wyoming have Enabling Acts or constitutional disclaimers essentially identical to Arizona's and New Mexico's. See North Dakota, South Dakota, Montana and Washington Enabling Acts, 25 Stat. 676, 677 (1889); Idaho Const. Art. 21, § 19, ratified by Congress, 26 Stat. 215 (1890); Wyo. Const. Art. 21, § 26, ratified by Congress, 26 Stat. 222 (1890); Utah Enabling Act, 28 Stat. 107, 108 (1894). Related provisions are present in the Oklahoma and Alaska Enabling Acts. *See* Oklahoma Enabling Act, 34 Stat. 267, 270 (1906); Alaska Enabling Act, 72 Stat. 339 (1958), as amended by 73 Stat. 141 (1959).

tion in *Colorado River*, there is no doubt that the decisions below will "enervate the [McCarran] Amendment's objective" by "excluding those [Indian] rights from its coverage," 424 U.S. at 811, in the nine western disclaimer states.

The disclaimer/nondisclaimer jurisdictional distinction created by the Ninth Circuit was a distinction Congress did not make during passage of the Amendment.[20] Not only are the Senate Subcommittee[21] hearings on the Amendment and the Senate Report recommending its passage devoid of any reference to a jursidictional distinction resulting from the disclaimer's presence, this legislative history affirmatively establishes that a shared understanding existed among Congress, the Executive Branch, and the proponents and opponents of the bill that state court jurisdiction over the United States and all of its water rights, including those held on behalf of Indians, would be universal in the west.

The Senate Report recommending enactment of the bill clearly states that the purpose of the legislation is

> to permit the joinder of the United States as a party defendant in *any* suit for the adjudication of rights to the use of water of a river system or other source . . . where it appears that the United States is the owner or

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[20] In rejecting the Tenth Circuit's resolution of the identical issues (indeed, even the same disclaimer language) in *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (1979), *cert. denied*, 444 U.S. 995 (1979), the Ninth Circuit charged that the *Jicarilla* court had "refused to recognize the distinction between states with constitutional disclaimers and those without." (Pet. App. C-9; 668 F.2d at 1086). To the contrary, what the Ninth Circuit "refused to recognize" was that the Tenth Circuit did not see fit to create a disclaimer/nondisclaimer distinction under McCarran since Congress had made no such distinction.

[21] Senators Arthur J. Watkins of Utah and Warren G. Magnuson of Washington, two of the three members of the Senate Subcommittee which considered S. 18, represented disclaimer states. In fact, Senator Watkins presided over the McCarran hearings. Senate Hearings at II, 1.

> is in the process of acquiring water rights by appropriation under State law, by purchase, exchange, or otherwise and that the United States is a necessary party to such suit.

Senate Report at 2 (emphasis added). Moreover, after initially noting that the adjudication of water rights involving the United States would in most instances be confined to the 11 western states applying the doctrine of prior appropriation,[21] the Senate Judiciary Committee was of the opinion that there was "no valid reason why the United States should not be required to join in a proceeding when it is a necessary party and to be required to abide by the decisions of the Court in the same manner as if it were a private individual." *Id.* at 6. Noticeably absent from these statements is any intention by the Committee to restrict the Amendment's jurisdictional consent to the minority of nondisclaimer western states.[22]

The transcript of the McCarran hearings also confirms that it was the Executive Branch's understanding that the proposal would be of universal application throughout the 17 western states. Mr. William H. Veeder, the Justice Department's spokesman at the hearings, fully understood that the proposed waiver of the United States' immunity from suit extended to all 17 western states:

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[21] *Id.* at 2-3.

[22] Another confirmation that the Committee intended the proposal to be applicable to disclaimer states such as Washington is Senator McCarran's reassurance to Senator Magnuson that the bill was not intended to be used for the purpose of delaying Bureau of Reclamation projects like the Hells Canyon project on the Snake River in Idaho, but rather was intended only to "allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream." *Id.* at 9; *see also, United States v. District Court In and For the County of Eagle*, 401 U.S. 520, 525 (1971).

> You have a general waiver of immunity for every water right in the United States. You not only have a waiver of immunity, you subject us to the administration *of every State*. We would be forced . . . to have 17 different procedures west of the one hundredth meridian in which to try our litigation.

Senate Hearings at 14 (emphasis added). Indeed, the Subcommittee ordered the transcript printed because, as recognized by Senator Watkins, "[T]he water rights people out West in all the States will be very much interested in this bill. In fact, nearly every State in the West is interested." *Id.* at 64.

The testimony before the Subcommittee also compels the conclusion that the Amendment was intended to be operative in the disclaimer states. Much of Senator Watkins' discussion with witnesses appearing before the Subcommittee focused on existing controversies in the disclaimer states of Utah, Arizona, and Washington, and how they would be affected by the United States' involuntary joinder under the proposal. *See* Senate Hearings at 3, 5-6, 9, 11-17, and 32. That Congress intended the Amendment to be operative in Arizona is also clear from the Committee's acceptance of an amendment offered by the National Reclamation Association to dispell any notion that this Court's original jurisdiction in *Arizona v. California*, No. 8, Original, was to be concurrent with the state courts under the bill. Senate Hearings at 6, 54; Senate Report at 6. Had the Committee intended the Amendment to be ineffective in Arizona for the adjudication of tribal claims, it would have been unnecessary to accept an amendment designed to assure that the determination of conflicting interstate rights to the mainstream of the lower Colorado, which included substantial Indian claims,[23] could not be shifted to an Arizona state court. Thus, McCarran's legislative history throughly dispels any notion that Congress intended to cre-

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[23] *See Senate Hearings at 6; see also Arizona v. California*, 376 U.S. 340 (1964).

ate a jurisdictional dichotomy between the nine western states with disclaimers and the eight without disclaimers.

B. *State Court Jurisdiction Under McCarran Is Not Affected By Arizona's Disclaimer.*

The Ninth Circuit "believe[d] that recognition of this [disclaimer/nondisclaimer] distinction is crucial in deciding the jurisdiction issue" presented by the Arizona tribes' efforts to stop the United States' continued participation in Arizona's comprehensive state proceedings. (Pet. App. C-9; 668 F.2d at 1086). This belief cannot be logically supported for two reasons. First, the very language of the disclaimer has nothing to do with claims held by the United States. Second, the disclaimer merely acknowledges the absolute jurisdiction and control over Indian lands by the United States.

The irrelevance of the disclaimer's language to the United States' joinder in a state court McCarran proceeding was affirmed by the Tenth Circuit in *Jicarilla*. Focusing on McCarran's legislative history and this Court's previous emphasis on that history in *Colorado River*, the court held that McCarran intended the United States "to represent, as guardian, the federally reserved water rights of the Indian tribes in any state court general water rights adjudication proceeding . . . ." 601 F.2d at 1130. Since the United States, not the individual tribes, was the proper party defendant in the state proceeding because it "owned" the tribes' rights under *Colorado River's* reasoning, the State's exercise of jurisdiction over the United States did not conflict with the disclaimer as to Indian lands. Therefore, because the jurisdictional conflict the Ninth Circuit believed to be created by the disclaimers does not exist in a McCarran proceeding under *Jicarilla's* reasoning, the Arizona disclaimer remains irrelevant to its state courts' exercise of jurisdiction over the United States.

Second, the disclaimer supports, rather than conflicts with, McCarran's grant of state court jurisdiction. The tribal respondents have been unable to substantiate their contention that the disclaimer's language acknowledging that Indian lands remain "subject to the disposition and under the absolute jurisdiction and control of Congress" bars adjudication in the Arizona state court. Enactment of the McCarran Amendment was an exercise of "the absolute jurisdiction and control of Congress", and thus, is entirely consistent with, not contrary to, the express wording of the disclaimer.

This absolute congressional control over Indian lands is not, of course, unique to disclaimer states. This Court has long recognized that Congress possesses paramount power over all Indian tribes and their property,[25] and it recently reaffirmed that the sovereignty Indian tribes retain "exists only at the sufferance of Congress and is subject to complete defeasance." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). *See also Washington v. Yakima Indian Nation*, 439 U.S. 463, 501 (1979). Congress, consistent with the paramount federal control acknowledged by this Court's prior opinions and by Arizona's disclaimer, exercised that power over tribal claims to water through "the special consent to jurisdiction given by the McCarran Amendment." *Colorado River*, 424 U.S. at 812 n. 20. That is, McCarran subjects tribal claims held by the United States to state court jurisdiction in Arizona and the eight other disclaimer states for the same reason those identical tribal claims are subject to state court jurisdiction in nondisclaimer states — they are all subject to absolute congressional control.

Notwithstanding the disclaimer's explicit acknowledgment of this absolute control, the tribes resist McCarran's automatic extension to the disclaimer states. These states, claim the tribes, must "accept" McCarran by repealing their disclaimers. Of course, McCarran does not mention,

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[25] *See, e.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 594 (1977); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 546-67 (1903).

much less mandate, any such repeal, but the tribes point to Public Law 83-280, passed some 13 months after McCarran, as "evidence" that this requirement exists whenever disclaimer states desire to exercise congressional grants affecting Indians.

In reality, however, the "evidence" is precisely to the contrary. Both before and after enactment of the McCarran Amendment, Congress has exercised its plenary authority to extend state authority to Indian reservations without any requirement for repeal of the disclaimers.[26] For example, in 1901, Congress authorized the Secretary of Interior to permit state or local authorities to establish public highways, in accordance with state laws, through reservations and other Indian lands. 25 U.S.C. § 311. Even more significant is the fact that in 1928 this statute and several others governing the acquisition of rights-of-way through Indian lands were specifically made applicable to the Pueblo Tribes of New Mexico, notwithstanding New Mexico's disclaimer. 25 U.S.C. § 322. In 1924, Congress permitted all states to tax the production of oil, gas and other minerals on Indian reservations. 25 U.S.C. § 398. See also 25 U.S.C. § 398c. In 1929, Congress authorized all states to enforce

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[26] The tribes' suggestion that repeal of the disclaimers, as specifically permitted for the assumption of jurisdiction under Public Law 280, should also extend to the McCarran Amendment is foreclosed not only by the Amendment's legislative history, but also by the canons of construction applicable to congressional acts — the views of a subsequent Congress provide no controlling basis from which to infer the purposes of an earlier Congress. *Haynes v. United States*, 390 U.S. 85, 87 n. 4 (1968); *Rainwater v. United States*, 356 U.S. 590, 593 (1958). Furthermore, when Congress carefully includes a provision in one statute and excludes it from another, it should not be implied where excluded. *City of Burbank v. General Electric Co.*, 329 F.2d 825 (9th Cir. 1964). Likewise, limitations upon an otherwise general grant of power are not to be lightly inferred. *Massachusetts Trustees of Eastern Gas & Fuel Associates*, 312 F.2d 24 (1st Cir. 1963), *affirmed*, 377 U.S. 235 (1964). Congress simply did not intend to impose a disclaimer repeal requirement like Public Law 280's to McCarran's grant of jurisdiction over the United States. If it had so intended, it would have said so.

their sanitation and quarantine laws on Indian reservations, to make inspections for health and educational purposes, and to enforce compulsory school attendance. 25 U.S.C. § 231; *see also, Organized Village of Kake v. Egan*, 369 U.S. 60, 73 (1962). Similarly, in 1953, Congress permitted the sale of liquor on all Indian reservations subject to state law, on consent of the tribes. 18 U.S.C. § 1161; *Kake*, 369 U.S. at 74. See also, 25 U.S.C. §§ 349, 357 and 1919. Not one of these provisions purported to create any distinction between disclaimer and nondisclaimer states and not one required repeal of the disclaimers.

With respect to Arizona, Congress in 1978 *required* Arizona to exercise criminal and civil jurisdiction over lands held by the United States in trust for the Pascua Yaqui Tribe "as if it had assumed jurisdiction pursuant to the Act of August 15, 1953 (67 Stat. 588) [Public Law 280], as amended by the Act of April 11, 1968 (82 Stat. 79)." 26 U.S.C. § 1300f; *see also* 25 U.S.C. § 766(b) and (e)(4) (similar provisions affecting the Paiute Indians of Utah). Here, Congress specifically found neither Arizona's decision to decline Public Law 280 jurisdiction nor the continued presence of its disclaimer a limitation upon this congressional grant of jurisdiction over Indian lands. Similarly, in 1966, Congress permitted Arizona or any of its political subdivisions contiguous to the San Xavier reservation near Tucson or the respondent Salt River Pima-Maricopa Indian Community's reservation near Phoenix to bring suit in the district court or, if that court should lack jurisdiction, in the state courts to enjoin any nuisance creating a health hazard on leased reservation lands. 25 U.S.C. § 416a(b); *see also* 25 U.S.C. § 416(f) (permitting the dedication of San Xavier and Salt River Pima-Maricopa reservation lands to the public for streets, alleys and other public purposes under the laws of Arizona); 25 U.S.C. § 642(b) (requiring mortgaged Hopi Industrial Park lands to be subject to foreclosure and sale under the laws of Arizona, and allowing the United States, as an indispensable party, the right to remove the action from state courts); 40 U.S.C. § 290 (making

workmen's compensation laws applicable on Indian reservations to claims by reservation Indians against non-Indian employers). Indeed, the Ninth Circuit recently held in *Begay v. Kerr-McKee Corp.*, 682 F.2d 1311 (9th Cir. 1982), that as a result of 40 U.S.C. § 290, Arizona's workmen's compensation laws are applicable to Indian claims arising on the Navajo reservation.

Like McCarran, each of these provisions was viewed by Congress as being of general application to Indians and their reservations without regard to the presence of the disclaimers. Like McCarran, Congress made no distinction between states with disclaimers and those without. Like McCarran, Congress was exercising its absolute plenary control over Indians and their lands in adopting this legislation. And, like McCarran, it is simply too late in the day for these provisions to be deemed ineffective in those nine states containing the 21 largest Indian reservations and nearly half the Nation's Indian population. *See Memorandum for the United States* at 12-13, 15. Arizona's disclaimer is not at all inconsistent with Congress' exercise of authority over Indian lands through its passage of McCarran.

C. *Arizona's Disclaimer Does Not Deprive Its Courts Of Subject Matter Jurisdiction To Adjudicate Water Claims Held By The United States On Behalf Of Indians.*

The Ninth Circuit's conclusion that Arizona's state courts cannot determine tribal claims to water held by the United States until Arizona's disclaimer is repealed was based entirely upon the court's assumption that the disclaimer was a complete and absolute relinquishment of "subject matter jurisdiction over Indian water rights." (Pet. App. C-7-C-8; 668 F.2d at 1085). In so holding, the Ninth Circuit inter-

preted the disclaimer's "absolute jurisdiction and control" language as meaning *exclusive* federal jurisdiction, an interpretation this Court explicitly rejected in *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962).

Arizona's disclaimer contains two different provisions relating to Indian lands. First, the State disclaimed "all right and title" to Indian lands within its boundaries, as well as to the vast expanse of unappropriated and ungranted public lands within the new state. Second, Arizona acknowledged that until the Indians' title is extinguished, those lands "remain subject to the disposition and under the absolute jurisdiction and control of the Congress . . . ." Ariz. Const. Art. XX, § 4. Neither of these provisions, however, deprives the state courts in disclaimer states of subject matter jurisdiction to determine, under McCarran, claims to water held by the United States on behalf of Indians.

1. *Arizona's Disclaimer of "Right and Title" Is a Disclaimer of Proprietary, Rather Than Governmental, Interest.*

In *Kake, supra*, this Court considered Alaska's disclaimer which, except for its specific application to fishing rights, is worded like those of the nine other western disclaimer states. After noting that "[t]he momentum of substantially identical past admission legislation touching Indians carries the settled meaning governing the jurisdiction of States over Indian property" to Alaska's disclaimer, 369 U.S. at 68, Mr. Justice Frankfurter held "[t]he disclaimer of right and title by the State was a disclaimer of proprietary rather than governmental interest."[27] *Id.* at 69. *See also Draper v. United States*, 164 U.S. 240 (1896).

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[27] Since Alaska's regulation of the use of fish traps was a governmental exercise, Mr. Justice Frankfurter's distinction rendered this provision irrelevant to the issue of whether the disclaimer deprived it of jurisdiction to regulate Indian fishing rights. 369 U.S. at 68.

The mere adjudication in a state forum of water rights claimed by the United States for Indians does not constitute an assertion by the state of a proprietary interest. Following this Court's holding in *Kake*,[28] the Tenth Circuit specifically found in *Jicarilla* that this "contention is particularly persuasive in light of the non-proprietary intent in subjecting the United States to a state action involving a general water right adjudication as provided under the McCarran Amendment." 601 F.2d at 1133. This Court also acknowledged the nonproprietary nature of a McCarran state adjudication in *Colorado River* when it stated that "[t]he [McCarran] Amendment in no way abridges any substantive claim on behalf of Indians under the doctrine of reserved rights." 424 U.S. at 813. This conclusion is necessarily true in view of this Court's previous holding in *United States v. District Court In and For the County of Eagle*, 401 U.S. 520 (1971), that "the volume and scope of particular reserved rights are federal questions" which will be determined by the state court through application of federal law. *Id.* at 526.

In short, Arizona's adjudication proceedings, like those of Colorado and New Mexico, provide only the procedural framework contemplated by McCarran through which all rights can be comprehensively adjudicated *inter sese* on the Salt, Verde, Gila, and Little Colorado river systems. The State's paramount interest is its governmental interest in securing a comprehensive adjudication under its "established elaborate procedures for allocation of water and adjudication of conflicting claims to that resource." *Colo-*

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[28] Only ten months before their opinions in *San Carlos Apache Tribe* and *Navajo Nation*, two of the three Ninth Circuit judges on that panel ruled in *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274 (9th Cir. 1981), that Arizona's disclaimer, like New Mexico's, only disclaimed its proprietary interest in Indian land, not its "governmental or regulatory authority over that land." *Id.* at 1280.

rado River, 424 U.S. at 804. As in *Kake*, this provision of the disclaimer does not affect the Arizona state court's exercise of jurisdiction over the United States and any water right claims asserted on behalf of the tribes.

2. *This Court's Prior Decisions Confirm That Absolute Congressional Jurisdiction And Control Over Indian Lands Does Not Invariably Mean Exclusive Federal Jurisdiction.*

After recognizing that Alaska's disclaimer of "all right and title" to Indian fishing rights did not preclude the State from barring the Indians' use of fish traps, *Kake* next considered whether the disclaimer's acknowledgment that those fishing rights "shall be and remain under the absolute jurisdiction and control of the United States" barred the State's regulatory effort. *Kake*, 369 U.S. at 67-71. In confirming Alaska's authority to regulate these fishing rights despite the wording of this provision of the disclaimer, this Court specifically held that " 'absolute' federal jurisdiction is not invariably exclusive jurisdiction." 369 U.S. at 68. The Court reached this conclusion on the basis of its prior decision in *Williams v. Lee*, 358 U.S. 217 (1959), a case involving the jurisdiction of an Arizona court:

> Indian lands in Arizona remained 'under the absolute jurisdiction and control' of the United States, 36 Stat. 557, 569; yet in *Williams v. Lee*, 358 U.S. 217, 220, 223, we declared that the test of whether a state law could be applied on Indian reservations there was whether the application of that law would interfere with reservation self-government.

363 U.S. at 67-68. Applying the *Williams v. Lee* test in *Kake*, this Court found no infringement of reservation self-government by Alaska's regulation of Indian fishing rights.[29] Obviously, if Arizona's disclaimer had prohibited state court jurisdiction in *Williams* and if Alaska's disclaimer had prohibited state regulation in *Kake*, there

[29] *See also Metlakatla Indian Community v. Egan*, 369 U.S. 45, 58-59 (1962).

would have been no need for this Court to have resolved these disputes on the basis of whether tribal self-government had been infringed.[29]

Fifteen years later, this Court reiterated "the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). *See also, Puyallup Tribe v. Washington Department of Game*, 433 U.S. 165, 174-75 (1977) (Washington state courts possess subject matter jurisdiction to determine on-reservation treaty fishing rights of reservation Indians). Although the Ninth Circuit conceded below that there was no interference with tribal self-government, it nevertheless summarily concluded that "[t]he power of a court in a disclaimer state to enforce a regulatory statute that may adversely affect Indians falls far short of the power to adjudicate a direct challenge to Indian water rights in and to the waters of streams." (Pet. App. C-11; 668 F.2d at 1087).

The Ninth Circuit articulates no rationale to support this sweeping conclusion except the same premise with which it begins its analysis: *i.e.*, that the disclaimer itself deprives the states of judicial power. This *a priori* reasoning ignores the cited line of cases from *Kake* through *Mescalero* to *Puyallup* and thus fails to analyze the problem correctly by inquiring whether the adjudication of federal Indian water rights, together with all other water rights, in a single com-

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[29] This Court has continued to hold, even in disclaimer states, that such state regulation is permissible where there is no infringement on the right of tribal self-government. *E.g. Washington v. Confederated Tribes*, 447 U.S. 134 (1980); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976).

prehensive stream adjudication suit (which will apply federal substantive law in defining federal rights), intereferes with traditional tribal self-government or intrudes upon an area preempted by federal regulation.

In the case at bar, the Court of Appeals noted in passing that the state adjudication suits do not interfere with tribal self-government, and the United States, far from preempting regulation or control of federal water rights in federal court, has by the McCarran Amendment explicitly acknowledged the right of state courts to adjudicate federal water right claims, including those asserted on behalf of Indian tribes.

The Ninth Circuit's holding not only departs radically from this Court's previous decision in *Kake* on the meaning and effect of the western disclaimer provisions, but it also rejects this Court's express holding in *Williams v. Lee* that

> *absent governing Acts of Congress*, the question has always been whether the state action infringed on the rights of reservation Indians to make their own laws and be ruled by them.

358 U.S. at 220 (emphasis added). The overriding effect accorded to a governing Act of Congress under the *Williams v. Lee* analysis was expressly recognized in *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971). There, the Blackfeet Tribal Council adopted an ordinance which purported unilaterally to grant the Montana state courts civil jurisdiction, concurrent with tribal courts, over all suits involving tribal defendants. Giving effect to the governing Act of Congress, this Court rejected Montana's attempt to justify the State's exercise of this tribally ceded jurisdiction under the infringement test:

> With regard to the particular question of the extension of state jurisdiction over civil causes of action by or against Indians . . . there was, at the time of the Tribal Council resolution, a "governing Act of Congress," *i.e.*, the Act of 1953 [Public Law 280]. Section 7 of that statute conditioned the assumption of state jurisdic-

> tion on "affirmative legislative action" by the State; the Act made no provision whatsoever for tribal consent, either as a necessary or sufficient condition to the assumption of state jurisdiction.

400 U.S. at 427. *See also Fisher v. District Court*, 424 U.S. 382 (1976) ("No federal statute sanctions this interference with tribal self-government." *Id*, at 388).

The tribal respondents have uniformly sought to distinguish the holdings in *Draper v. United States*, 164 U.S. 240 (1896), *Williams v. Lee, supra, Kake, supra, Mescalero Apache Tribe v. Jones, supra* and *Puyallup Tribe v. Washington Department of Game, supra*, on the basis that those cases only involved attempts by disclaimer states to regulate non-Indians or non-reservation Indian activities. Moreover, the respondents have argued that the Ninth Circuit's conclusions are consistent with these opinions, relying primarily upon this Court's holding in *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973), which rejected Arizona's taxation of a reservation Indian's reservation income. The tribes' reliance on *McClanahan* is misplaced, however, because the Court's holding turned upon the absence of congressional authorization for imposition of the state tax even though reservation Indians and reservation incomes were directly affected. In holding that reservation inhabitants remained immune from Arizona's income tax, Mr. Justice Marshall explained that:

> State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress.

411 U.S. at 170-71, *quoting from* U.S. Dept. of the Interior, *Federal Indian Law* 845 (1958). In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), decided on the same day as *McClanahan*, Mr. Justice White, in writing for the

majority, reiterated that "*McClanahan v. State Tax Commission of Arizona, supra,* lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent." 411 U.S. at 148. *See also Bryan v. Itasca County,* 426 U.S. 373, 377 (1976).

Here, in contrast to *McClanahan,* but consistent with *Kennerly,* there is a governing Act of Congress. Here, the "governing Act of Congress" is the McCarran Amendment, which the Tenth Circuit specifically found to be the case in *Jicarilla,* 601 F.2d at 1135; which this Court specifically relied upon in *Colorado River* to "conclude that the state court had jurisdiction over Indian water rights", 424 U.S. at 809; and which this Court further held to be "[t]he most important" factor in favor of state court jurisdiction. *Id.* at 819.

The Ninth Circuit refused to consider the McCarran Amendment as a governing Act of Congress because it was unwilling to allow "federal courts to give up their protective jurisdiction over Indian lands, including water rights." (Pet. App. C-9-C-10; 668 F.2d at 1086). This paternalistic rationale was rejected in *Colorado River:*

> Mere subjection of Indian rights to legal challenge in state court, however, would no more imperil those rights than would a suit brought by the Government in district court for their declaration, a suit which, absent the consent of the Amendment, would eventually be necessitated to resolve conflicting claims to a scarce resource.

424 U.S. at 812.

Indeed, the United States has conceded that it makes "little practical sense" to delete Indian water claims from state court McCarran proceedings in the disclaimer states, "where, as it happens, most such rights arise .... Thus, the momentum of the Court's past decisions carries the day

against the disclaimer ruling below." *Memorandum for the United States* at 15-16. In short, this Court has not equated absolute congressional jurisdiction with exclusive federal court jurisdiction.

D. *Public Law 280 Is Inapplicable To Adjudication Of Water Rights.*

The Ninth Circuit directed the district court on remand to "determine if Arizona has properly asserted jurisdiction pursuant to Public Law 280." (Pet. App. A-11; 668 F.2d at 1098). This is a meaningless exercise inasmuch as adjudications of water rights are expressly excluded from the scope of jurisdiction conferred by Public Law 280:

> Nothing in this section ... shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property [including "water rights"] or any interest therein.

25 U.S.C. § 1322(b). Public Law 280 was never intended as a vehicle for water rights adjudications; instead, as this Court observed in *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979), it is a general jurisdictional statute that was enacted to deal with the "problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." *Id.* at 471. Moreover, this Court in *Colorado River* specifically rejected any notion that McCarran's special consent to jurisdiction is limited by the general provisions in Public Law 280. 424 U.S. at 812 n. 20. After noting that footnote 20 was a "crucial footnote" (Pet. App. C-5; 668 F.2d at 1084), the Ninth Circuit inexplicably failed to apply it. The inappropriateness of the Court of Appeals' remand for determination of the Public Law 280 question has been conceded by the United States, *Memorandum for the United States* at 8 n. 15, and only further highlights the Ninth Circuit's error in

relegating the McCarran Amendment and this Court's holding in *Colorado River* to relative insignificance in at least nine of the 17 western states.

II.

CONSIDERATIONS OF WISE JUDICIAL ADMINISTRATION COUNSEL AGAINST THE TRIBAL ACTIONS IN FEDERAL COURT

In reversing the two Arizona cases on the disclaimer issue, the Ninth Circuit did not reach the considerations of wise judicial administration which this Court had applied in *Colorado River* and which the Arizona district court had relied upon[31] in dismissing the tribal actions. The two judge majority in *Adsit*, however, did address these considerations. Notwithstanding substantial differences between the Arizona and the Montana cases, the *Adsit* analysis will have a lasting impact upon Arizona's efforts to comprehensively adjudicate its river systems, all of which involve significant Indian claims.

A. *The Clear Federal Policy Evinced By McCarran Requires Dismissal Of The Piecemeal Tribal Actions In Arizona.*

The Ninth Circuit's decisions in the two Arizona cases condone and encourage the use of federal courts to disrupt legitimate proceedings in state courts. This Court has repeatedly frowned upon the procedural ploy of reactive litigation in federal court. *E.g., Will v. Calvert Fire Ins. Co.,*

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[31] The passing comment in the *San Carlos Apache Tribe* opinion that "the district judge did not make findings on this issue", Pet. App. A-10; 668 F.2d at 1098, is clearly incorrect. The district judge did make specific findings on the issue of " 'wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.' " Pet. App. E-6, E-7-E-9, E-14; 484 F.Supp. at 780-82, 784.

437 U.S. 655 (1978); *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942) ("Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided." *Id.* at 495).

While the use of the federal courts for such a purpose is generally inappropriate, it is particularly improper here since Congress, by enactment of the McCarran Amendment, has specifically embraced "a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals." *Colorado River*, 424 U.S. at 819. Moreover, this Court expressly held in *Colorado River* that the McCarran Amendment itself—with its underlying objective of avoiding the piecemeal adjudication of water rights—was "the most important" factor, 424 U.S. at 819, of wise judicial administration clearly counseling against the concurrent federal court proceedings. *Id.*

1. *None of the Arizona Federal Actions Are General Stream Adjudications.*

In reviewing the considerations of wise judicial administration favoring dismissal of the Arizona tribes' federal actions, it is necessary to compare the nature of the actions in the Arizona state court to the nature of the actions in the Arizona federal court. The proceedings in state court are comprehensive general adjudications. They satisfy each of the requirements for a McCarran Amendment general adjudication that this Court laid down in *Dugan v. Rank*, 372 U.S. 609 (1963):

> (1) All claimants to water rights along the river must be made parties;
>
> (2) The relief to be sought must be *inter sese* among all claimants; and
>
> (3) The water rights of all claimants, *inter sese*, must be established.

Id. at 618-19. First, the Gila River system (into which the tributary adjudications on the Salt, Verde and San Pedro rivers have been consolidated by the Arizona Supreme Court) covers an area of approximately 57,800 square miles, or nearly half the area of the State of Arizona.[32] The proceeding on the Little Colorado River encompasses another 19% of Arizona. Already, process has been served by certified mail on some 12,000 potential water claimants in the Salt River general adjudication[33] and on some 58,000 potential water claimants in the Little Colorado River general adjudication. Second, the objective of the actions in Arizona's state court is to establish the relative rights of *all* claimants to use water from the river systems. See A.R.S. § 45-251(2) (Supp. 1982) (JA 119). Finally, it is clear from A.R.S. § 45-257(B) (Supp. 1982) (JA 126) that the actions in the Arizona state court will establish the relative rights of all claimants on an *inter sese* basis:

> The court, upon review of the master's report and in accordance with rule 53 of the Arizona rules of civil procedure, shall:
>
> 1. Determine the extent and priority date of and adjudicate *any* interest in or right to use the water of the river system and source . . . .

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[32] *Special Master's Final Report and Recommended Decree, Arizona v. California* at 11 (December 5, 1960).

[33] Process has also been served on some 12,000 potential claimants in the San Pedro general adjudication, and 11,062 claims have been filed with the Arizona state court, including 547 claims by the United States. Although this proceeding was not challenged by any of the respondents before this Court, it is nonetheless a part of the general adjudication of water rights in the greater Gila River watershed.

Service of process on all potential water claimants in the Verde River watershed and the remaining Gila River watershed has been delayed pending resolution of the Ninth Circuit's decisions in *San Carlos Apache Tribe* and *Navajo Nation*. Indeed, *all* proceedings in the consolidated Gila River general adjudication and the Little Colorado River general adjudication have been expressly stayed as a result of these two Ninth Circuit decisions. *See, e.g.*, Pet. App. G and H.

> 2. Establish, in whatever form determined to be most appropriate by the court, one or more tabulations or lists of *all* water rights and their relative priorities on the river system and source . . . .

(Emphasis added.) Thus, the Arizona federal court's conclusion that it is "difficult . . . to imagine how the State proceedings could be considered as anything less than a general adjudication of water rights," (Pet. App. E-13; 484 F.Supp. at 784), is obviously well-founded.

By contrast, *none* of the actions initiated by the respondent Indian tribes in the Arizona federal court is a general adjudication; none of those actions seeks any comprehensive determination of water rights. They either seek no determination of any water rights at all;[34] or seek only a determination of one tribe's rights as against a few individual claimants or against alleged "defendant classes."[35] It is difficult to conceive of a more piecemeal amalgamation of litigation, a crucial point that led Judge Merrill in his dissent in *San Carlos Apache Tribe* to note that, "In fact, however, the suits now before us would not even constitute piecemeal adjudication; rather, they would result in no effective adjudication at all." (Pet. App. A-13; 668 F.2d at 1099).

The *Colorado River* logic and the reasoning against piecemeal adjudications apply with even greater force to the Arizona cases. Neither the federal court proceedings nor the state court proceedings in *Colorado River* were piecemeal; both were comprehensive general adjudications. Yet, to give meaning and effect to the McCarran Amendment's "policy that recognizes the availability of comprehensive state systems for adjudication of water rights," 424 U.S. at 819, this Court dismissed the comprehensive federal pro-

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[34] See note 12, *supra* at 8.

[35] See notes 13, 14, and 15, *supra* at 8-9.

ceedings in deference to the comprehensive state proceedings.[38]

Unlike *Colorado River* and unlike the pending Montana cases, the Arizona cases present a choice between comprehensive general adjudication in the Arizona state court and piecemeal, inconclusive water litigation in the Arizona federal court. That the McCarran Amendment was enacted to avoid this kind of piecemeal litigation is indisputably clear from this Court's holding in *Colorado River*:

> The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system.

424 U.S. at 819. Indeed, Assistant Attorney General William H. Veeder explained on behalf of the Department of Justice at the McCarran hearings that "[a]s a water lawyer, Senator [Watkins], you know the only way you get complete relief is to have everyone before the court." Senate Hearings at 4.

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[38] In this respect, Mr. Justice Brennan specifically noted that to address critical problems of water resource allocation, "several Southwestern States have established elaborate procedures for allocation of water and adjudication of conflicting claims to that resource. [Footnote 2. *See*, e.g., Ariz. Rev. Stat. Ann. §§ 45-102 to 45-106, 45-141 to 45-154, 45-180 to 45-193, 45-231 to 45-254 (1956 and Supp. 1975). . . .]." 424 U.S. at 804. This is particularly true of the statutory procedure in Arizona, which is specially designed to facilitate fair and efficient adjudication of thousands of water claims. Like the New Mexico statutory procedure at issue in *United States v. New Mexico*, 438 U.S. 696 (1978), and the Colorado statutory procedure at issue in *Colorado River*, the Arizona statutory procedure incorporates the specialized hydrological expertise of the Arizona Department of Water Resources. *Compare* A.R.S. § 45-256 (Supp. 1982) with N.M.S.A. § 72-4-17 and C. R. S. § 37-92-302 (Supp. 1981). By contrast, there is no similar procedure available to the federal court.

2. *The Arizona Federal Actions Would Result in No Effective Adjudication of Water Rights at All.*

Only a few water claimants are parties to the six different tribal actions in the Arizona federal court. That, of course, by itself renders "complete relief" impossible. Moreover, the problem of sovereign immunity precludes any meaningful relief at all for two reasons. First, it is undisputed that Indian tribes generally are immune from suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *California v. Quechan Tribe of Indians*, 595 F.2d 1153 (9th Cir. 1979). Yet, there are at least two tribes with competing water claims on every one of the river systems under adjudication in Arizona.[37] Without a waiver of sovereign immunity (such as in a McCarran Amendment general adjudication), it is impossible to determine the relative water rights of one Indian tribe vis-a-vis the rights of other tribes on the same watershed.

Moreover, it is undisputed that the United States owns millions of acres of land in the watersheds under adjudication.[38] It, too, enjoys sovereign immunity from suits to determine water rights, except in McCarran Amendment

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[37] The Navajo Tribe and the Hopi Tribe are situated within the Little Colorado River watershed. Within the Gila River watershed are situated the following tribes: (1) White Mountain Apache Tribe, (2) San Carlos Apache Tribe, (3) Payson Community of Yavapai-Apache Indians, (4) Yavapai Prescott Indian Community, (5) Camp Verde Indian Reservation, (6) Fort McDowell Mohave-Apache Indian Community, (7) Salt River Pima-Maricopa Indian Community and (8) Gila River Indian Community.

[38] Arizona is no different in this respect than Colorado, New Mexico and the other western states. As this Court acknowledged in *United States v. New Mexico*, 438 U.S. 696 (1978), "[m]ore than 60% of the average annual water yield in the 11 western states is from federal reservations." *Id.* at 699 n. 3.

general adjudications.[39] *Dugan v. Rank*, 372 U.S. 609, 617-619 (1963). Without the United States as a party, the "determination" of discrete tribal water rights in the Arizona federal court will be meaningless. Such a "determination" would not bind the United States, which could then relitigate the "determination" all over again. That is precisely what occurred in *United States v. Hellard*, 322 U.S. 363 (1944) ("Though the Indian's interest is alienated by judicial decree, the United States may sue to cancel the judgment and set the conveyance aside where it was not a party to the action." *Id.* at 366). *See also United States v. Candelaria*, 271 U.S. 432 (1926); *Privett v. United States*, 256 U.S. 201 (1921).

Such a situation is precisely why the McCarran Amendment was enacted in the first place—to allow for the definitive determination of water rights in unified proceedings. Because this factor is inextricably tied to the very purpose and policy of the McCarran Amendment, it clearly dictates that the piecemeal proceedings in the Arizona federal court be dismissed so that all water rights may be comprehensively and definitively determined in the unified

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[39] The United States made this point crystal clear in *Navajo Nation v. United States*, the only one of the actions in the Arizona federal court in which it has appeared as a party. The United States argued that it was entitled to dismissal by reason of its sovereign immunity from suit, which had not been waived inasmuch as the action was not a general adjudication. *Brief for the United States*, filed on May 29, 1981, in *Navajo Nation v. United States*, Nos. 80-5471, 80-5837, United States Court of Appeals, Ninth Circuit.

general adjudications in the Arizona state courts.[40]

Furthermore, the Arizona state adjudications are fully consistent with the Colorado River Basin Project Act, 43 U.S.C. § 1501, *et seq.* The legislative history underlying enactment of Section 1534(d), which requires implementation of water exchange agreements among Arizona users who also use water from the Gila River system, reaffirms the long-standing congressional policy in favor of comprehensive general adjudications:

> The committee recognizes that certain water rights on the Salt and Gila River systems, with which exchanges are contemplated, have never been adjudicated as to their legality and their dates of priority in relation to the rights of other water users. *It is anticipated that a complete adjudication of all such rights will be ef-*

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[40] While the "most important" factor counseling against concurrent federal proceedings is the clear federal policy evinced by the McCarran Amendment to avoid piecemeal adjudication, *Colorado River* also evaluated four other related factors, 424 U.S. at 820, some of which have general relevance to this case:

(a) absence of proceedings in federal court other than filing the complaint. There have been no proceedings in the three cases seeking adjudication of individual tribe's rights in the Arizona federal court. Notes 13, 14 and 15, *supra*. There are no proceedings in the other tribes' federal cases because they seek no adjudications of any kind.

(b) extensive involvement of state water rights (occasioned in the Colorado state proceedings by suit naming 1,000 defendants). On the rivers for which the number of potential claimants has been identified, there is extensive involvement in the Arizona state litigation—12,000 potential claimants on the Salt River, 12,000 on the San Pedro, 58,000 on the Little Colorado, and 80,000 on the Verde River. *Supra* at 7 and notes 8 and 33.

(c) distance between state and federal court. This factor is relevant in the Little Colorado proceeding in the Apache County Superior Court, over 200 miles from the federal court in Phoenix.

(d) participation by the Government in the state proceedings. Before the stay of further proceedings in the consolidated Gila River adjudication, all 12,000 defendants in the San Pedro adjudication had been served and 11,062 claims had been filed, including 547 by the United States. Numerous non-federal claims to the Salt River were also filed before the stay.

> *fected* before valid and meaningful exchange arrangements may be negotiated between the Secretary and the prospective upstream beneficiaries of exchange agreements.

H.Rep. No. 1312, 90th Cong., 2d Sess. (1968), reprinted in 1968 *U.S. Code Cong. & Ad. News* 3666, 3718 (emphasis added). The decisions below make it impossible to have a complete adjudication of water rights in Arizona and, in addition to subverting the McCarran Amendment and its underlying policy, they also subvert the congressional understanding underlying enactment of 43 U.S.C. § 1534(d).

B. *The Decisions Below Preclude The Adjudication Of Indian Water Rights In Both State And Federal Courts.*

The most remarkable "consideration" of "wise" judicial administration that the Ninth Circuit purported to address in *Adsit* was its conclusion that the United States was precluded from representing the tribes as a result of a claimed conflicts of interests between Indian water rights and other federal water rights. (Pet. App. C-16; 668 F.2d at 1090).[41] This conclusion effectively repeals 25 U.S.C. § 175, enacted by Congress in the exercise of its complete and plenary authority over Indians and Indian affairs, which provides that "[i]n all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity."

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[41] This holding, which must, under the Ninth Circuit's reasoning, be applicable irrespective of whether the litigation is conducted in a state court or a federal court, renders the proceedings initiated by the United States in the Montana federal court meaningless. Thus, the holding as it now stands makes complete adjudication of water rights impossible in both state and federal courts.

The Ninth Circuit then refused to put the tribes to a "Hobson's choice" (Pet. App. C-16; 668 F.2d at 1090), by requiring them[42] to waive their sovereign immunity by intervening in any litigation where they do not desire to have their interests represented by the United States because of a conflict. The resulting inability to adjudicate such a tribe's water claims flies flagrantly in the face of this Court's holding in *Colorado River* that "legislative history demonstrates that the McCarran Amendment is to be construed as reaching federal water rights reserved on behalf of Indians." 424 U.S. at 811.

The majority opinion altogether ignored the sound reasoning of the Tenth Circuit in *New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977), notwithstanding the fact that eight months earlier, the Ninth Circuit had specifically held that intervention by the tribes in water right adjudications is proper:

> It is therefore appropriate for courts to be concerned with the adequacy of the government's representation of its Indian wards, and to grant tribes leave to intervene where proper. *See, e.g., New Mexico v. Aamodt*, 537 F.2d 1102, 1106 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977).

United States v. Truckee-Carson Irrigation District, 649 F.2d 1286, 1301 (9th Cir. 1981), *modified*, 666 F.2d 351 (9th Cir.), *cert. granted*, 51 U.S.L.W. 3287 (1982). Indeed, in its modification of the *Truckee-Carson* decision, the Ninth Circuit explained that receipt of notice of adversity between the United States and an Indian tribe in a water rights adjudication "might have suggested to the Tribe that it *must* seek to intervene. . . ." 666 F.2d at 353 (emphasis added).

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[42] The Ninth Circuit also doubted whether the tribes even had a right to intervene. Pet. App. C-16; 668 F.2d at 1089. *But see Arizona v. California*, 439 U.S. 419, 436 (1979), and Special Master Elbert T. Tuttle's Report in *Arizona v. California*, dated February 22, 1982, at 26-27.

The Ninth Circuit's contrary holding in *Adsit* that the United States cannot represent Indian tribes in water rights litigation and that the tribes cannot be required to intervene where they disapprove of such representation not only enevates the McCarran Amendment, but repeals it. The practical result of the Ninth Circuit's decisions would be to stop virtually every adjudication of water rights in the western United States.

C. *The United States' Proposal For Concurrent Proceedings In Federal Court Was Rejected By The Congress And By This Court As Neither Sensible Nor Practical.*

The United States proposes that whenever a general adjudication is initiated in a state court, both the United States and any affected Indian tribe should then have the right to initiate additional litigation in federal court for the determination of their "discrete" claims. Those "determinations" could then simply "be 'plugged in' to the comprehensive decree ultimately rendered in the general State court stream adjudication." *Memorandum for the United States* at 18. No authority for depriving the state court of its jurisdiction in order to carry out this curious and admittedly piecemeal procedure was offered.

In fact, a similar procedure was initially considered and then specifically rejected by Congress during its consideration of the McCarran Amendment. As originally drafted, the McCarran Amendment contained the following proviso:

> *Provided*, That the United States shall have the right of removal to the Federal court of any such suit in which it is a party. . . .

Senate Hearings at 1. However, this provision was deleted after objections were voiced, interestingly enough, by the United States. Mr. William H. Veeder, speaking on behalf of the Department of Justice, explained that it was unacceptable to allow the federal courts to disrupt the specially designed state adjudication procedures:

> The first point that I have here is that under this bill, if this bill were enacted, the United States could be named a defendant with the right to remove the case to the Federal court for adjudication, if that were to occur, we would in effect have two methods of adjudicating rights. We would have the situation where the Federal court was adjudicating rights, and superseding in effect the State procedure which is in existence.

Senate Hearings at 5. It is truly astonishing that the Justice Department now asks this Court to permit the federal courts to "supersed[e] in effect the State procedure" when the Congress (as a result of the contrary position articulated by the Justice Department) expressly rejected this federal role.[43]

Moreover, in *Colorado River* this Court also rejected the proposal now advanced again by the United States. Although Mr. Justice Stewart, in his dissenting opinion, mentioned the notion of incorporating the federal decree into the state court decree, 424 U.S. at 825, the majority

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[43] Unfortunately, this is not the first time that the United States has advanced contradictory arguments regarding the McCarran Amendment. For example, when sued in *Rank v. Krug*, 142 F.Supp. 1, 69-75 (S.D.Cal. 1956), the United States argued that the McCarran Amendment waived sovereign immunity only in administrative proceedings; on the other hand, in *In re Green River Drainage Area*, 147 F.Supp. 127 (D.Utah 1956), the United States argued that McCarran was applicable only to judicial actions. The persistence of the United States to avoid application of McCarran has even led to arguments characterized by Mr. Justice Douglas as "almost frivolous." *United States v. District Court In and For the County of Eagle*, 401 U.S. 520, 523 (1971).

held that "actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings." *Id.* at 819.

The proposal advanced by the United States calls for obvious duplicative litigation and ensuing conflict between state and federal courts over allocation of rights to the same property. Non-Indian claimants cannot be bound by a federal court determination of Indian rights if they are not parties to the federal proceeding. Therefore, either the federal decree will be worthless (binding only the Tribe and claimants it may be able to join) or all of the tens of thousands of non-Indian claimants will have to become parties not only in the state proceeding, but in every federal proceeding in which a tribe claims rights on a river system. Even then, other tribes and the federal government will not be bound unless they waive their immunity from suit. The expense, time and effort required of individual claimants and the waste of judicial and administrative resources would be staggering. Moreover, it would be impossible for a state court to "consolidate" or "plug in" all of the ultimate decrees (let alone somehow coordinate their timing) because so many claimants would not be bound by decrees purporting to adjudicate the rights to water they also sought. Prioritization and protection of rights would be impossible because of the absence of a common binding decree. It would be hard to conceive of a more confusing and unworkable approach to "solving" a problem which, after all, has already been resolved by the McCarran Amendment and this Court's *Colorado River* decision.

The unstated but nonetheless implicit premise of the "plug in" proposal is that state courts are incompetent to address issues of federal reserved water rights or that Indian water rights will not be adequately protected in state

courts.[44] Of course, both of these arguments were rejected in *Colorado River*. 424 U.S. at 812-813. Furthermore, the ability of state courts properly to determine federal reserved water rights is illustrated by *United States v. New Mexico*, 438 U.S. 696 (1978), where this Court affirmed the New Mexico Supreme Court's interpretation and application of the doctrine of federal reserved water rights.

Petitioners agree with the United State's observation that "[i]t is, indeed, intolerable to permit unquantified Indian water rights indefinitely to cast a shadow over competing diversion claims. . . ." *Memorandum for the United States* at 17. Petitioners also submit that, in view of the McCarran Amendment's "policy that recognizes the availability of comprehensive state systems for adjudication of water rights," *Colorado River*, 424 U.S. at 819, the United States' proposal for concurrent piecemeal litigation in federal court has little merit. This was true in *Colorado River*, where the choice of forums was between comprehensive general adjudications pending in both federal and state court, where the United States won the race to the courthouse and where Indian claims were less extensive than in Arizona. Here, where the choice is between comprehensive general adjudication first commenced in the Arizona state court and piecemeal, inconclusive litigation in the Arizona federal court, the McCarran Amendment's policy is even more compelling.

CONCLUSION

There is no problem of more immediate and long-term significance in Arizona and the other arid western states than the allocation of their most precious resource—water. The sparse precipitation, coupled with mushrooming popu-

[44] Such arguments are a disservice to state court judges everywhere, but particularly in this case since the two federal judges who presided over the Arizona cases were Arizona state court judges for many years before their appointments to the federal bench in 1979 and 1980. These judges are not more fair or more competent as federal judges than they were as state judges.

lations and expanding industrial development, has created an ever-increasing demand for an ever-diminishing supply. Conflicting demands have arisen between rural and urban needs, agricultural and industrial users and Indian and non-Indian claimants. Establishing the priorities of these conflicting claims to the State's over-appropriated river systems is crucial to bring order to chaos, to implement realistic municipal and industrial development in this fragile environment, and to conserve and manage the dwindling water supply.

The McCarran Amendment supports these goals; the Court of Appeals' decisions thwart them. Acceptance of the Ninth Circuit's conclusions precludes establishing priorities to competing claims. Congress recognized these evils and sought to cure them by lifting the United States' immunity from suit in special, comprehensive general adjudications. The Court of Appeals returned to the pre-McCarran era at least the nine western states containing the 21 largest Indian reservations, nine-tenths of all Indian lands (excluding Alaska) and nearly half the Nation's Indian population. The Ninth Circuit's decisions cannot be permitted to stand; they must be reversed in favor of the rulings of the Arizona district court which permit resolution of all conflicting claims in Arizona's comprehensive general adjudications.

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